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## LAND WARFARE DURING THE RUSSIAN-UKRAINIAN WAR AND INTERNATIONAL HUMANITARIAN LAW

**Abstract.** The Russo-Ukrainian War is one of the largest – and probably the most intensive – conflicts of the last several decades. Fought between large, regular, and well-equipped forces of two sides, it naturally provides an extremely wide scope of materials for analysis as to the functioning of *ius in bello*.

At the current stage, however, the evidence is often piecemeal and unclear, particularly taking into consideration the lack of access to documents and to Russian materials. While there is a significant body of evidence to indicate serious violations of humanitarian law, including indiscriminate or deliberate attacks on civilian targets, a detailed analysis requires taking into consideration a broader scope of circumstances which at this point are unclear. One of areas where we have strong evidence, if based on a sample, is the issue of the treatment of the prisoners of war. In general, the initial information seems to indicate widespread and systematic violations of humanitarian law during the conflict.

**Keywords:** humanitarian law, *ius in bello*, Ukraine, Russia, cluster munitions, prisoners of war, landmines, weapons usage, war crimes

## DZIAŁANIA LĄDOWE PODCZAS WOJNY ROSYJSKO- -UKRAIŃSKIEJ I MIĘDZYNARODOWE PRAWO HUMANITARNE

**Streszczenie.** Wojna Rosyjsko-Ukraińska jest jednym z największych – i potencjalnie najintensywniejszym konfliktem ostatnich kilku dekad. Toczona pomiędzy dużymi, regularnymi i dobrze wyposażonymi siłami dwóch stron w naturalny sposób dostarcza niezwykle szerokiego materiału dotyczącego stosowania przepisów *ius in bello*.

Na aktualnym etapie materiał dowodowy w tym obszarze często jest jednak wycinkowy i niepewny, w szczególności w związku z brakiem dostępu do dokumentów oraz do materiałów po stronie rosyjskiej. O ile istnieją silne przesłanki do przyjęcia że w wielu przypadkach mamy do czynienia z działaniami prowadzonymi w sposób nierozróżniający czy z celowymi atakami na cywilów, dokładna analizy tego stanu rzeczy wymaga uwzględnienia szerszego zakresu okoliczności, które w tym momencie są niepewne. Jednym z obszarów w których dane są stosunkowo konkluzywne,

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choć oparte o badania próbki, jest kwestia traktowania jeńców wojennych. Wstępne informacje sugerują jednak na szeroki i systematyczny charakter naruszeń prawa humanitarnego w toku konfliktu.

**Słowa kluczowe:** prawo humanitarne, *ius in bello*, Ukraina, Rosja, amunicja kasetowa, jeńcy, miny lądowe, użycie broni, zbrodnie wojenne

The conflict between Russia and Ukraine includes the largest number of land forces engaged on either side since the Iraqi-Iranian war of 1981–1989<sup>1</sup> and may have surpassed this conflict in the intensity of fighting.<sup>2</sup> Modern communication technologies allow unprecedented amount of information to be collected and made available, resulting in this conflict being perhaps the best documented war in history (Hofman 2023), tracked almost in real time all around the world.

As a result, the amount of potential information concerning activities of either side seems to be very extensive. However, this also creates a significant amount of information noise and unconfirmed claims concerning the events on the battlefield. Multiple claims concerning violations of humanitarian law which were made in news outlets or (especially) on Internet forums cannot be verified. Similarly as was noted in the case of air war, so far no independent international institution – such as the OSCE, the ICC, or the UN – managed to obtain full access to the military records and data of either Ukrainian or Russian armed forces, and any investigation at best used samples and widely available data.

In certain fields, independent inquiries were prepared by some NGOs, such as the Human Rights Watch. However, those used only sample data and thus may not provide a full picture. Moreover, the assessment of certain requirements of *ius in bello* can be done only by an analysis of specific situation and by waging relevant requirements and details of a given situation. Such details are currently not available in most cases, making assessments of legality very difficult.

Scale of warfare makes it impossible to describe in such a text specific reported instances of violations of attacks on a small scale. As such, the text concentrates on providing a general outline of possible violations of *ius in bello* in Russian-Ukrainian conflict as far a ground operations are involved.

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<sup>1</sup> The Armed Forces of Ukraine are usually cited to number around 700,000 personnel – (ukr-military, 2023). It is notoriously difficult to estimate how many troops are present on the Russian side; it is not clear if the provided numbers fully include rear echelon and associated forces (PMCs, forces from other republics), but the number is certainly at least in the hundreds of thousands – the mobilisation in autumn 2022 included around 300,000 personnel and at least three waves of conscription of around 130,000 each, in addition to the pre-war strength. The Gulf War of 1991 could be considered to have had more men present in the Theatre of Operations at a given moment (at around 1,700,000 for both sides combined), but the overall number of soldiers involved was lower.

<sup>2</sup> At the time of the battle of Al Faw, Iraq achieved greater shell usage per day than Russia did during the height Battle of Donbass in June 2022, but in the latter conflict such intense fire was maintained for far longer. See: Cordesman (1991, VIII–39).

## 1. MILITARY OPERATIONS

To assess the usage of weaponry, we need to first take into consideration general requirements concerning military operations. Three interdependent principles – *military necessity*, *humanity*, and *honour* – provide the foundation for other law of war principles, such as *proportionality* and *distinction*, and most of the treaty and customary rules of the law of war (U.S. DoD *Law of War Manual II*).

- *military necessity* – only measures necessary to accomplish legitimate military objectives should be taken, provided international law does not otherwise prohibit those measures;

- *humanity* – measures should not inflict suffering, injury, or destruction which is not necessary to accomplish a legitimate military objective;

- *proportionality* – attacks expected to cause incidental harm to civilians or damage to civilian property which is excessive in relation to the concrete and direct military advantage to be gained have to be avoided. All feasible precautions to avoid or reduce incidental civilian harm have to be taken;

- *distinction* – the used weapons and measures have to be able to distinguish between civilians and combatants and between protected and unprotected objects.

Whether the requirements of those principles were met has to effectively be decided on case-by-case basis, taking into account a specific situation. At this stage of the conflict, it is not feasible to present a careful case-by-case analysis due to lacking and incomplete information. Therefore, only specific issues related to particular fields will be presented in the text.

## 2. ATTACKS ON CIVILIAN TARGETS

The majority of attacks on civilian targets were carried out by either aviation or long range effector, and as such are described in the appropriate chapter. On multiple occasions, we have, however, seen frontline ground forces carry out attack against civilian targets which could clearly be identified as civilian. Such attacks can be traced back to the very first day of the war<sup>3</sup> and have continued since. Russian soldiers were reported to open fire on civilian targets, e.g. to deal with a traffic jam (Queen 2022). Such attacks were clearly intended as direct attacks on civilian targets, and not cases of mistaken identity or indiscriminate weapons usage, and are gross violations of international norms.

Particularly during the first phase of the war, Russia conducted large-scale, indiscriminate shelling with artillery of Ukrainian residential areas and other civilian targets. Investigation by the OHCHR in its *Report of the Independent*

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<sup>3</sup> Examples occurred as early as on the first day of the war – such as footage of BMP – 2 IFV opening fire on civilian car parked on the road (Radio 2022b). Similarly, in the testimony regarding the death of Ivan Levankov, orders to carry out an attack on civilian cars in a traffic jam were given on the first day of invasion (Queen 2022; Bell 2022).

*International Commission of Inquiry on Ukraine* estimated that by 10<sup>th</sup> September, 2023, at least 8,062 persons were killed and 16,610 were injured in attacks carried out against residential areas (the number included both air and artillery attacks). The actual number was noted as being likely higher. During the investigation, it was concluded that indiscriminate attacks with explosive weapons were the most common case of civilian deaths during the conflict.

Many of Russian basic weapons of war, used in large numbers against citizen and civilian areas, are by design not capable of precise, discriminate attacks,<sup>4</sup> but despite that they were employed in mass attacks on Ukrainian positions. Additionally, as the OHCHR noted, in many cases, the Commission has not been able to identify any military presence in the locations affected by the attacks. Either the targets were not being verified, or attacks were carried out against civilian targets with premeditation, and not as an effect of indiscriminate weapons being used.

### 3. ATTACKS ON HUMANITARIAN CORRIDORS

During the early stage of the war, several Ukrainian cities were effectively encircled by the Russian forces. While IHL does not define or regulate such corridors specifically, their creation is an instrument helping to fulfil duties of safeguarding the civilian population. Article 23 of the Fourth Geneva Convention states that belligerent parties must allow the passage of medical and hospital consignments and objects necessary for religious worship. Further, it requires those Parties to allow “the free passage of all consignments of essential foodstuffs, clothing and tonics intended” for singularly vulnerable populations – namely “children under fifteen, expectant mothers, and maternity cases” (see also U.S. DoD *Law of War Manual*, § 5.19). Article 70 of Protocol I Additional to the Geneva Conventions expands on Article 23, extending the “circle of those benefitting [from relief] to the whole of the civilian population.” Humanitarian corridors can thus be a means of allowing and facilitating the unimpeded passage of such consignments, equipment, and personnel – and while they are not compulsory, such agreements should be followed in good faith (U.S. DoD *Law of War Manual*, § 5.19).

Russian forces did enter into local agreements to establish humanitarian corridors and to temporary cease fire to allow the evacuation of civilians. Despite those agreements, corridors from cities such as Mariupol, Sumy, or Kharkiv came under repeated attack from armed forces of the Russian Federation (Tan 2022).

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<sup>4</sup> For example, the basic and most common in Russian army MLRS system BM – 21 Grad when fired at a range of 20 km, with a full salvo of 40 rockets has a lethal area of up to 600 m x 600 m (Jelic 2013).

Direct shelling of evacuation routes was reported as preventing evacuation from Sumy. In THE case of Mariupol security corridor, it was additionally reported by the ICRC as being mined upon being established.<sup>5</sup>

Such attacks are both a violation of the countries' duties mentioned above as well as a direct attack on civilians. At no point did Russia provide any proof that the corridors were being used by military forces. At the time of the attack, the Russian forces were aware that the areas would be used for exclusively civilian traffic and could not be seen as a military objective. Therefore, such shelling should be considered as a violation of Art. 51 of the I Additional Protocol to Geneva Conventions.

#### 4. THE USAGE OF LANDMINES IN UKRAINE

As weapons of war, landmines have received considerable attention during the war. In recent months, Ukraine has been reported to be one of the most mined countries in the world<sup>6</sup> and, especially during the operations in summer 2023, very high density of newly laid minefields has been reported.<sup>7</sup>

Ukraine signed the Mine Ban Treaty on 24<sup>th</sup> February, 1999, and ratified it on 27<sup>th</sup> December, 2005, becoming a State Party on 1<sup>st</sup> June, 2006. Meanwhile, the Russian Federation is not a signatory of the treaty, although scholars argue that anti-personnel landmines are in almost all cases indiscriminate weapons, as their usage in accordance with the rules of *ius in bello* is almost impossible (ICRC 1997).

For the most part, Ukraine followed its obligations concerning anti-personnel landmines. Ukrainian forces were reported by the Human Rights Watch to have deployed anti-personnel landmines only in the ending days of 2022, during the battle of Iziium. As a result of this usage, several civilian casualties, including one death, were reported. Ukraine promised to investigate the issue, though at the time of this text being written specifics are unclear. The HRW did claim that the investigation was being stymied and did not produce any specific results (HRW 2023). No further claims concerning the usage by Ukraine of landmines appeared after this from independent organisations.

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<sup>5</sup> Information about corridor being useless due to mining was provided by Dominik Stillhart, director of operations for the International Committee of the Red Cross (ICRC) for BBC (Tan 2022). At the time, the terrain was under control of the Russian forces, and Ukraine had likely no capability to place the mines, hence they had to be laid down by Russia.

<sup>6</sup> The opinion on Ukraine being the most mined country in the world was expressed by the Ukrainian Foreign Minister Dmytro Kuleba. It is estimated that about 174,000 square kilometres are contaminated by mines and ERW, which is about equal to the total area of Cambodia, which was presently called the most mined country in the world.

<sup>7</sup> According to Defence Minister Oleksii Reznikov, Ukrainian military sometimes encounter as many as five Russian mines per square meter of territory (Tyshchenko 2023).

Russian news did claim to have uncovered thousands of mines and other examples after the Battle of Mariupol during anti-mining operations, which will take time until 2024 (TASS 2022). No specific claims were presented as to whether those were anti-personnel landmines or unexploded ordnance, nor about which side deployed them. Nor is it possible to verify those claims, given that no details were given as to what percentage of ordnance recovered were landmines, and no independent investigation occurred. Additionally, Russia made several claims concerning the usage by Ukraine of anti-personnel landmines in other circumstances (example: Chronology 2022). All those, however, remained unconfirmed and no independent organisation collaborated them.

In comparison, the usage of anti-personnel landmines by Russian forces was widespread. Ukrainian Prosecutor General Irina Venediktova claimed that air-delivered landmines were used by the Russian forces in the Kharkiv region as early as 26<sup>th</sup> February, 2022 (Venediktova 2022). After this, petal mines were scattered over city and residential areas multiple times, such as in Sumy or Popasnyaya. The use of at least 13 types of mines has been reported, including broad usage of the above-mentioned air-delivered “butterfly mines”, where any markings or the removal of mines afterwards is effectively impossible, and which are, therefore, by their nature almost always indiscriminate as to their effects. Mines were also used by Russia to deny access to agricultural areas, creating a threat to farmers (Deprez 2023). Despite this, the number of landmine civilian victims so far has remained relatively low compared to other causes, with 124 dead and 286 wounded as of April 2023 according to the Ministry of Defence (Tyschenko 2023), presumably due to static nature of fighting in the last year, where there was limited opportunity to mine areas attended by civilians.

Additionally, Russian forces also emplaced numerous victim-activated booby traps, particularly during the retreat from Kyiv and Kharkiv offensives in early April 2022. Rigging a booby-trap qualifies as an “attack”, to which IHL rules regarding the conduct of hostilities apply (Schmitt 2022).

In some reported cases, booby traps were placed in items meant only for civilian usage – such as washing machines (Grylls 2022) or under dead bodies (Baker 2023). While using booby traps in a way which would reduce harm to civilians is not prohibited, using them without regard to whether they will harm combatants or civilians amounts to an indiscriminate attack (AP I, art. 51, 52; U.S. DoD *Law of War Manual II*, § 6.12.5.1, 6.12.5.2; ICRC *Customary IHL Study*, rules 1, 11). Traps deployed by Russia were in some cases clearly meant to cause harm to civilian targets, possessed in their deployed form almost no military utility and as such were intended as an attack on civilian population.

In certain other cases, the usage of booby-trapped bodies was reported. Such an action, apart from the above-mentioned indiscriminate effect, would amount to perfidy and is considered a war crime (see Rome Statute, art. 8(2)(b)(xi)).

The Mine Ban Treaty prohibits antipersonnel mines, but not anti-vehicle mines, which are subject to general prohibitions regarding the usage of weapons of war. The usage of those weapons by both sides has been widespread and had significant effect on the conflict. While of limited danger to humans on foot, anti-vehicle landmines deployed in Ukraine do create a danger to civilians, both directly – through their explosive potential – and through denial of access to homes, infrastructure, transportation routes, and agricultural areas used by civilians. Moreover, there is an agreement that any explosive device that is capable of being detonated by the unintentional act of a person is an antipersonnel mine and is thus prohibited under the Mine Ban Treaty (ICRC 2023).

Both sides are using stockpiles of older Soviet-era anti-vehicle contact and proximity mines, while Ukraine has been supplied with additional ordnance of at least 7 types. Some of older, particularly Soviet-era anti-tank mines do not have any method to self-destruct (HRW 2022) and as a result remain a significant threat throughout the period of their deployment. There is no specific obligation to include such self-destruction mechanism, but it is a factor in assessing compliance with specific provisions of humanitarian law. At this point, it is difficult to assess the legality of usage of anti-vehicle landmines in Ukraine. Their large-scale usage happened in the static part of the conflict; inhibiting the movements of military units clearly cannot be associated with any breaches of customary or contractual obligations of both belligerent countries. Anti-vehicle landmines were, however, also used to block landlines and civilian roads by Russian forces during the retreat from Kyiv and Kharkiv offensives. Such action as attacks on roads are not, by themselves, a breach of obligations concerning the usage of weaponry. Roads and other civilian infrastructure can be considered as legitimate targets as transportation objects – provided they are being or can be used for military purposes (Dinstein 2002). Particularly during a retreat, the mining of roads has direct military utility with the aim of slowing down potential pursuit.

An atypical threat associated with anti-landmines occurred after the destruction of the Nova Kakhovka dam, where the current would carry significant amount of landmines, threatening civilians on flooded areas. However, this threat seems to be outside of the scope of liability concerning the usage of mines as a method of waging the war. It is also unclear to which side the landmines which created such threat belonged,<sup>8</sup> further making it impossible to assign such liability.

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<sup>8</sup> While the mines were washed from the Russian-held shore, either party could have been responsible for placing them – Russia as a defensive measure, while artillery or air-delivered mines could have been placed by Ukraine to limit enemy movement.



## 5. THE USAGE OF INCENDIARY AMMO AGAINST CIVILIAN TARGETS

The usage of incendiary ammunition is regulated primarily by the Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. Both Ukraine and the Russian Federation are signatories of this protocol, having signed it as Republics of the Soviet Union. In its Art. 2.3, it does allow the usage of ground-launched incendiary ammunitions including against concentration of civilians, provided that the military objective is clearly separated from the concentration of civilians and all feasible precautions are taken to limit the damage to civilians and civilian structures.

Whereas Russia has already been accused of usage of prohibited incendiary weapons during the Syria conflict (HRW 2017; HRW 2019), in Ukraine a larger scale of the usage of such weapons has been claimed. Russian armed forces have used incendiary ammo against civilian targets on multiple occasions – such as during the siege of Azovstal (Grynszpan 2022), during the fighting in Bakhmut (Murphy 2023) as well as against city areas in Vulhedar, including the white phosphorus munitions (Barnes 2023). There appears to be no attempt taken by Russia to limit the effects of weapons in those cases pursuant to the requirements of Protocol III. In the case of Bakhmut attacks, Ukraine confirmed that those were carried out against areas with no civilian presence (Murphy 2023). In other cases, however, no such separation has been made. Particularly in the case of Azovstal attacks, it was clear that the area was occupied by civilians at the time. Ukraine has launched its own criminal investigations in the firebombing of Azovstal; no outcome has been reported to date.

Apart from the above-mentioned attacks, it is possible that incendiary ammunitions were used to start forest fires and burn fields (UNCG 2022). Protocol III prohibits in the Art. 2.4 the use of incendiary weapons on forest or other plants unless the vegetation is used to conceal military objects. Therefore, in most cases, starting such fires would also constitute a breach of the Protocol III obligations. No investigation was conducted at this point as to whether the fires were started intentionally or as a side effect of fighting in the area.

There are no known cases of Ukraine military using incendiary weapons in a way which would create direct threat to the civilians. Russia did accuse Ukraine of using incendiary weapons during the Battle of the Hostomel airport.<sup>9</sup> However, even if true, in this case, the Protocol III requirements would be followed – airport

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<sup>9</sup> According to the Russian Ministry of Defence spokesperson (Meduza, February 27, 2022). Veracity of this statement appears to be in doubt; in the same meeting, a number of untrue statements about the Ukraine military were made and the claim itself included elements which were unlikely to be known to the Russian MoD at that point (such as specific systems which allegedly were used to fire incendiary rounds).



at the time was unlikely to house any civilians and its size makes indiscriminate effect easy to avoid.

Ban on incendiary weapons usage is severely limited by the scope of the applicability of Protocol III – it applies only to weapons primarily designed to set fire to objects or cause burn injury to persons. Therefore, it does not apply to certain weapons where the primary effect is non-incendiary. For example it does not apply to thermobaric weapons, which are used in large quantities by Russia, primarily in the form of TOS launchers. Those weapons do not meet the definition of an incendiary weapon as contained in the Article 1 of Protocol III, being classified as enhanced blast weapons instead (Türker 2016), though arguments to the contrary are raised.<sup>10</sup> However, they remain subject to general limitations on any other type of weapon and heavy explosive weapons, and should be avoided in urban or populated areas (ICRC Detonating the Air 2023). Russia was accused of deploying such weapons against city targets on multiple occasions, both at the opening stage of the conflict as well as later (Institute 2022a; 2022b). No evidence has publicly surfaced concerning instances of their illegal usage against civilian targets, though such claims were present since the beginning of full scale hostilities. Such weapons were reported as being used in inhabited areas even where Ukrainian positions were not present in the city – such as during the battle of Chernikhiv (Institute 2022b), strongly implying indiscriminate and disproportionate attacks.

## 6. THE USAGE OF CLUSTER MUNITIONS

Neither Russia nor Ukraine are a party to the Convention on Cluster Munition. However, such weapons are argued to have significant indiscriminate effect due to their inability to properly distinguish between military and civilian targets at the time of firing and their tendency to generate a significant number of unexploded dud ordnance which creates a considerable threat afterwards (HRW 2004).

While both of those factors create a situation where the usage of cluster munitions is likely to be in violation of the rules of International Humanitarian law, there is no reason to deliver a general prohibition of the use of such weapons from customary or conventional law. Cluster munitions can be still used against purely military targets, and the obligation to take measures to minimise the risks and effects of unexploded ordnance – both during as well as after the end of hostilities – can still be observed in accordance with Protocol V to the Convention on Certain Conventional Weapons.

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<sup>10</sup> The ICRC's review argued the rules on incendiary weapons that may, by analogy, be applied to the use of thermobaric weapons according to ICRC Rules 71–85 (Henckaerts, Doswald 2005).

So far, cluster munitions seem to be used by Ukraine exclusively in areas free from civilian presence, against military targets. Munition sent by the United States should possess a failure rate of no more than 2,35%, though it is questioned by some sources.<sup>11</sup> While such failure rate still creates a significant amount of unexploded ordnance<sup>12</sup> – being used in areas of high intensity combat, already saturated with unexploded remnants of war – it does not seem to create significantly higher risk to civilians. However, such munitions should be used carefully and taking into account potential effect after war.

Ammunition with high dud rate can be used in a manner consistent with the general requirements of humanitarian law. An example could be the attack carried out against the Berdyansk airport on the night of 16<sup>th</sup>–17<sup>th</sup> October, 2023. An attack against military airport would not threaten any civilian infrastructure or civilian lives, as such an installation by design is meant for military usage and its size precludes accidental effect. Even in the case of dud sub-munitions, using them in an area with restricted access, which is primarily meant for military personnel, would likely preclude an indiscriminate impact on civilian population.

No such restrictions are seemingly observed by Russia. Since the very first days of the conflict, cluster warheads were used by Russia to target civilian infrastructure, including hospitals, schools, residential areas, and others (HRW 2022; Amnesty International 2022). Russia uses cluster munitions of older, Soviet design with higher dud rate;<sup>13</sup> apart from the immediate risk to civilians, its usage against positions in urban centres creates significantly higher risk associated with explosive remnants of war. Violations of the rules of war concerning the usage of such weapons in the case of Russia are widespread and systematic.

A particularly tragic and noteworthy attack was carried out against the Kramatorsk station on 8<sup>th</sup> April, 2022, causing at least 58 civilian deaths and wounding over 100 others. Attack was carried out using OTR-21 *Tochka U* short-range tactical ballistic missile using cluster warhead.

Railway and rail infrastructure falls under the notion of “dual-use” objects, with both military and civilian applications, thus it may be a target of a military attack if it is deemed necessary to military operations (Dienstein 2002). Any such attack should, however, adhere to other principles and requirements, including proportionality and humanity. Targeting a railway station filled with civilians and refugees clearly exceeded these two principles and amounted to an indiscriminate attack, disproportionately causing civilian loss of life or injury, excessive in relation to the tangible and direct military advantage anticipated.

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<sup>11</sup> See, for example, Ismay 2023, who claims that the actual dud rate may be as high as 14%.

<sup>12</sup> Standard 155 mm shell as sent to Ukraine would contain 72 sub munition, meaning that even if the 2,35% goal is achieved, on average each such shell would produce two cases of unexploded ordnance.

<sup>13</sup> Reported being possibly as high as 40% (Dres 2023).

Moreover, the fact that cluster munitions were used strongly implies that the intention behind the attack was causing civilian deaths and not striking the rail hub as a dual-use installation. A smaller explosive pack of submunitions would effectively limit damage done to the railway hub itself compared to a classical high-explosive warhead. After the attack, buildings and infrastructure remained relatively undamaged, clearly implying that no military target at all was sought or achieved – the intended target was the civilian lives. The Russian side denied responsibility for this attack, although no other reasonable explanations exists and the station was clearly in the range of Russian launchers (SITU/Research 2023).

## 7. THE TREATMENT OF THE PRISONERS OF WAR

The scale of conflict between two organised armies and an active first phase lead to a significant number of prisoners of war being taken. The exact scale is unclear and no overall claims have been made. However, by December 2022, it was reported that about 3,400 Ukrainian servicemen remained in Russian captivity and 15,000 more were considered missing, according to A. Verbytska, the President's Commissioner for the Rights of Defenders of Ukraine (War Ukraine UA, 4<sup>th</sup> May, 2022). Similarly unclear is how many Russian soldiers were taken captive; around 2,500 prisoners from either side were exchanged (Ochab 2023). It is, therefore visible, based on the number of exchanges, that the number is in the thousands for both sides, possibly reaching around 10,000. As the war has not seen large-scale surrenders of surrounded forces, it seems unlikely that the number could be higher.

The Office of the United Nations High Commissioner for Human Rights did launch an investigation into the treatment of the prisoners of war. However, the investigation only managed to collect data from a sample of POWs, less than 10% of their total number based on estimations (OHCHR Treatment of Prisoners of War 2023).

Access to POWs was also not equal. The Government of Ukraine provided the OHCHR with full and confidential access to POWs in official places of internment, and Ukrainian authorities have engaged with the OHCHR in relation to concerns raised regarding the treatment of POWs. Meanwhile, in general, the OHCHR has not been granted access to POWs interned by the Russian Federation with the exception of a group of 13 Ukrainian men interned in a pre-trial detention facility in Luhansk, who could not be confidentially interviewed.

## 8. THE STATUS OF A PRISONER OF WAR

The 3<sup>rd</sup> Geneva Convention awards the status of a prisoner of war to all members of a nation military. Therefore, it should be respected regardless of nationality or organisation to which a person belongs. In the case of the Russian army, the status of prisoners of war should apply, aside from Russian Armed Forces, to members of militias from unrecognised republics (LPR, DPR, Abkhazia, and Southern Ossetia), Rosgvardia personnel, Private Military Contractors, volunteer units, and others. Similarly, on the Ukrainian side, the status of a POW should potentially apply to all units and members of military regardless of nationality, including international auxiliaries.

Throughout the period 2014 to 2022, Russia denied its participation in war. Similarly, Ukraine referred to ongoing conflict as an “anti-terrorist operation”. Famously, after full-scale hostilities were initiated on 24<sup>th</sup> February, it was referred to in Russia exclusively as a “special military operation”, with the usage of other names being punishable in Russia.<sup>14</sup> Despite that, at least in theory, the question of recognising Ukrainian prisoners as prisoners of war is not questioned by Russia. In certain situations, however, soldiers of selected units were denied such status. Russia famously initiated the number of “criminal charges” against members of certain units for activities that amounted to mere participation in hostilities. Combatants enjoy combatant immunity and cannot be prosecuted for mere participation in hostilities, or for lawful acts of war committed in the course of the armed conflict, even if such acts would otherwise constitute an offence under domestic law.

Of particular note were trials that begun in mid-June 2023 against 22 soldiers belonging to the Azov regiment (Radio 2023) and in mid July 2023, against 18 soldiers belonging to the Aidar battalion (Koroleva 2023). In both cases, charges included “membership in a terrorist organisation”. A significant number of additional Ukrainian prisoners of war received charges which amounted to mere participation in hostilities which are prohibited under the 3<sup>rd</sup> Geneva Convention. The results of those proceedings remain mostly unknown. Additionally, on at least one occasion, members of international legion were convicted for mercenary activities and terrorism, and working towards a violent overthrow of power in the Donetsk republic (HRW 2023), being sentenced to death. Similarly, two British and one Moroccan citizen were sentenced by the same court to death, but they were later exchanged for Russian POWs. Russia and aligned forces seem not to recognise foreign volunteers as members of armed forces of Ukraine in accordance with the 3<sup>rd</sup> Geneva Convention.

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<sup>14</sup> This seems to have been abandoned in latter part of 2023, with the conflict openly being referred to as “war” in official Russian media.

While Ukraine respects the status of Russian soldiers as prisoners of war, members of affiliated armed groups were subject to criminal proceedings with charges such as “trespass against territorial integrity, state treason, membership in a terrorist organisation, membership in an unlawful armed formation and unlawful possession of firearms” (OHCHR 2023). Those cases were primarily brought against people who were *de iure* Ukrainian citizens from either the Donetsk or Lughansk areas (no proceedings were reported against the citizens of Crimea). Regardless of the fact that those states are not recognised, personnel recruited from there should enjoy the status of prisoners of war on the basis of Art. 4 of the 3<sup>rd</sup> Geneva Convention. Moreover, as the OHCHR noted, in the overwhelming majority of cases, the charged personnel was forcibly recruited; this, however, has not been taken into account by Ukrainian courts. During those trials and in accordance with newly established Ukrainian law, the accused were pressurised to confess, and very strict sentences were given.

Both sides have, therefore, engaged in illegal proceedings against Prisoner of War in violation of the 3<sup>rd</sup> Geneva Convention, though in most cases the status of POWs is respected in principle.

## 9. THE MURDER, TORTURE, AND HUMILIATION OF PRISONERS OF WAR

Multiple cases of summary executions of Ukrainian prisoners of war have been noticed or alleged. The OHCHR report noted at least 14 cases of executions of the prisoners of war by Russia within the first year of war. Executions included both revenge killings upon capture as well as execution due to a lack of cooperation or as a part of terror tactics. Claims of additional cases of Ukrainian POWs being executed have emerged (Olynyk 2023), although so far they have not been verified.

At least 50 Ukrainian POWs were killed during the night of 28<sup>th</sup>–29<sup>th</sup> July, 2022, after a missile strike at barracks in the penal colony No. 120, located approximately 5 km east of the town of Olenivka in the Donetsk region. According to the OHCHR, repeated claims were made that the barracks were being used to shield Russian artillery before attack, such action being a clear violation of requirements of Art. 23 of the 3<sup>rd</sup> Geneva Convention. Additionally, at least part of deaths was caused by insufficient medical aid to the wounded. Moreover, initial investigation done by the OHCHR indicated that the damage to the barracks appeared consistent with a projected ordnance originating from the east – from Russian territory, and not Ukrainian HIMARS strike, as was initially presumed (OHCHR 2023). While more detailed investigation is needed, it is possible that the POWs were murdered in order to frame Ukraine.

A number of cases where Russian prisoners of war were executed by Ukrainian soldiers have been noted. The OHCHR has recognised at least 25 instances within the first year of the conflict. Additional cases occurred in

a situation where a group of eleven Russian soldiers surrendered and the last one opened fire, leading to deaths of all. It is unclear if the deaths occurred as part of execution or during the gunfight and whether it was intended or accidental. A potential perfidy of one of surrendering soldiers does not invalidate the status of others as POWs, although deaths could have occurred as an accident rather than intentionally.

It has to be repeated that in general, Ukraine is far more transparent than Russia on its own conduct. In particular, the OHCHR's mission was denied access to POW camps in Russia (Keaten 2022), which makes ascertaining the total scale of potential abuses difficult. In general, it is much easier to locate and pinpoint instances of humanitarian law violations on the part of Ukraine, especially as far as POW treatment goes. Comparably, the majority of cases where summary executions of POWs by the Russian side occur could only be identified through video footage or statements of surviving witnesses. Therefore, while the numbers as stated by the OHCHR seem to be comparable, ratio may, in fact, be significantly different, and known 14 cases are likely not a good representation of the scale of POW executions on the Russian side.

The General Prosecutor's Office of Ukraine has announced its intention to investigate certain cases of POWs execution and mistreatment, although so far no cases have been brought before courts and no developments on those cases have been noted.

## 10. TORTURE, BEATINGS, MISTREATMENT

Multiple cases of beating and torture were reported by Ukrainian prisoners of war returned from Russian captivity. According to the OHCHR, prisoners were mistreated and beaten both as a part of interrogation, to provide testimonies against other servicepersons, and in general for no seeming reason during their captivity and as a part of execution. Mistreatment and beatings did seem to be a perpetual element, occurring regularly, with some prisoners reporting "daily" beatings.

Of particular note are multiple allegations of castration of Ukrainian prisoners of war. While a single instance of such activity has acquired mass recognition (Amnesty International 2022), multiple additional instances were claimed, including by Ukraine Officials.<sup>15</sup> Those claims have been unconfirmed so far. At least one case of situation where POWs were used in a military operation was noted – in July 2022, where two POWs were used to approach and attack Ukrainian positions near Bakhmut, Donetsk region, by PMCs aligned with Russia,

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<sup>15</sup> See the address of Volodymyr Zelensky to the 77<sup>th</sup> session of the United Nations General Assembly, where he claimed that the video "is not the first case" of castration. For claims of multiple other cases, see, for example, Lamb (2023).

resulting in their deaths. In two other cases, Russian artillery was deployed next to places of internment of POWs, exposing them to the risk of counter battery fire, which is in violation of Art. 23 of the 3<sup>rd</sup> Geneva Convention.

Allegations emerged that Russia started using Ukrainian POWs to create military units (estimated at the battalion level or more) that would be sent to the front (Institute 2023). Article 7 of the 3<sup>rd</sup> Geneva Convention prohibits coercing prisoners of war of the other side to be sent to the front. Some actors argue that this provisions render unlawful any recruitment of prisoners of war, even as volunteers (Levie 1978; Krähenmann 2013). Even if the prisoners of war volunteered, one has to take into consideration widespread information on POWs not being granted sufficient food (described hereinafter). Starving POWs could be seen as a method of coercion in itself and as such is in itself a violation of the Rules of War. Similarly, widespread mistreatment and torture could be clearly seen as creating pressure on such prisoners of war to join military force, precluding their volunteer action.<sup>16</sup> The fact that the unit in question was not an official part of the Russian military forces would be of no consequence to assess the legality of such action.

Apart from large-scale torture and direct violence, in general, Russia has not followed on its obligations to treat POWs in a humane way and with respect (Articles 13 to 14), and to guarantee them appropriate standards of hygiene and healthfulness (Art 22). The OHCHR's mission has identified "consistent patterns of torture and ill-treatment, poor quartering conditions, and lack of food, water and proper medical attention" affecting Ukrainian prisoners of war in 32 out of 48 controlled sites. In the majority of cases, POWs were held in overcrowded cells or other forms of close confinement in violation of Articles 21 and 22 of the 3<sup>rd</sup> Geneva Convention. The places often lacked beds, fresh air, and adequate sanitation, and were exposed to cold temperatures. Food was often inadequate and in extreme situations POWs lacked access to clean water. Out of 203 Ukrainian POWs interviewed by the OHCHR, 171 (21 women and 150 men) reported the loss of a significant amount of body weight due to inadequate food. Similarly, appropriate sanitary supplies were for the most part not delivered and while wounded POWs did receive appropriate medical attention, in 4 identified cases, wounded or sick POWs died to its lack.

Even during the exchanges, prisoners of war were subjected to inhumane conditions and ill-treatment, in breach of Article 119 of the 3<sup>rd</sup> Geneva Convention. Reports included beatings, inhumane conditions of transport, and repeated humiliation of the POWs by guards during the way to exchange – including purposeful exposure to freezing temperatures.

The OHCHR's mission reported fewer cases of violation of rules on providing the prisoners of war with appropriate conditions in the case of

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<sup>16</sup> See, for example, *United States v. Weizsaecke et al.* (The Ministries Case), XIV Trials of War Before the NMT, 549.



Ukraine. POWs received appropriate water and food as well as quartering. While in many cases investigated POWs were quartered in prisons and detention centres, they were separated from other inmates and given more freedom. In general, the conditions of Russian POWs interment were in accordance with the requirements of the 3<sup>rd</sup> Geneva Conventions, although the OHCHR's mission did find certain violations and deficiencies. Russian POWs were often treated in a humiliating manner during their evacuation to transit camps and permanent internment facilities. POWs were frequently transported half-dressed, packed in minivans or trucks in stress positions, with their hands bound behind their backs. Afterwards, they were subject in multiple cases to humiliating treatment and, in some cases, to beatings and physical violence. That beatings and physical attacks were, however, significantly more limited in scope than in the cases of Russian abuses. The OHCHR did also note that the treatment of Russian POWs in Ukraine improved over time and certain older violations were amended (OHCHR 2023).

## **11. COMMAND LIABILITY – GROUND FORCES**

The Russo-Ukrainian conflict has seen a high number of units which were not part of their countries' respective militaries. In the case of Ukraine, this happened at the earlier stage of conflict, starting in the year 2014, which saw a number of independent volunteer units; over the years, those units were folded into the national military chain of command. By the opening of the large-scale hostilities in 2022, essentially no independent units operated outside of the main Ukrainian chain of command.

Meanwhile, during the invasion, Russia employed a significant number of units not fully integrated into the military chain of command. Apart from the Russian Armed Forces operating under the Ministry of Defence, multiple Rosgvardia units subordinate to the Security Council of the Russian Federation, the Private Military Contractors of varying allegiance, volunteer formations, and forces from non-recognised states were present. Units such as the Private Military Corporation Wagner group have become infamous for the scope of war crimes committed (Shcherba 2023). Other units of such nature included Patriot, Potok, or Aleksander Nevsky. In total, around 27 Private Military Corporation units were identified as active in Russia during the conflict, the majority of which participated to some extent in the war (Sauvage 2023). The placement of all those troops in the chain of command changed over time.<sup>17</sup>

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<sup>17</sup> The forces from the Donetsk and Lughansk republics were initially operating as partially separate detachments, being fully integrated into the Russian Armed Forces only after the annexation of both areas in 2022. PMC placement in the command chain also changed over time, with

This complex scope of actors does lead towards questions concerning potential command liability of Russian generals. The notion of command liability is well-entrenched in international law. Three elements must be proved before a person may incur superior responsibility for the crimes committed by subordinates: 1) the existence of a relationship of superiority and subordination between the accused and the perpetrator of the underlying offence; 2) the mental element, or knowledge of the superior that his/her subordinate had committed or was about to commit the crime; 3) the failure of the superior to prevent the commission of the crime or to punish the perpetrators.

Even a *de facto* authority requires that the superior wield powers of control that is substantially similar to *de jure* authority with regard to establishing responsibility.

Particularly in the case of the above-mentioned PMC, it is unclear to what extent the Russian command was effectively in a relationship of superiority to those groups. While they certainly acted under the general control of the Russian central authorities, theatre commanders were often reported to possess limited or no capacity to command those units. Famously, Wagner operations as carried out in the Bakhmut area were claimed to be essentially outside of the army chain of command, even to the extent where they would compete for resources with the Russian Armed Forces (see for example: Marten 2023). Such a situation is substantially different compared to requirements for *de facto* authority.

Similarly, it is not quite clear to what extent such liability could be established for various Rosgvardia units. Formations such as the 141. special motorised regiment seem to be operating largely independently of the main chain of command, primarily responding to Ramzan Kadyrov and to central authorities rather than to military command. For the most part, those units were also not taking active part in the fighting, being used in the rear instead. It is likely that no command responsibility of the Russian military command could be established in this case as well. To answer this question, more specific examination of Russian orders is necessary.

Numerous other units – in particular forces from non-recognised countries (the Lughansk or Donbass republics) – as well as volunteer battalions were, on the other hand, integrated into the chain of command of the Russian forces and, as such, their actions could entail the liability of appropriate commanders.

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the most noteworthy case being Wagner, which was integrated into the military chain of command only in the second part of 2023.

## 12. DURESS AND THE INDIVIDUAL LIABILITY OF RUSSIAN SOLDIERS

It should be noted that in certain situations, those Russian soldiers who refused to carry out illegal orders were subject to punishment, which in at least one case included an execution for sparing civilians (Quinn 2022). This leads to the question whether Russian soldiers, engaging into violations of humanitarian law, can be considered as acting under duress.

The question of duress has been critically approached by the ICTY in the Erdemovic case, where the majority of the judges refused to admit duress as a defence to the killings of civilians, noting that in this case, “implementation of international humanitarian law” should be asserted as an “absolute moral postulate” (ICTY Prosecutor v. Erdemovic 1997). However, this line of reasoning was not followed by the Rome statute, which addresses the question of duress in its Art. 31.

The question of duress is regulated under Art. 31 of the Rome Statute and includes three elements that have to be met in order for a soldier to claim that actions were carried out under duress: 1) The threat of imminent death or serious bodily harm; 2) The acts are necessary and reasonable to avoid the threat; and 3) No intention to cause a greater harm than the one sought to be avoided. It cannot be ruled out that in certain cases, Russian soldiers could claim duress under those conditions. However, in each such case, the existence of those elements would have to be proven separately. Threat has to be imminent (ICC Prosecutor v. Dominic Owden 2015) and information regarding Russian army practices does not imply that this can be claimed in general. It is also unclear to what extent the practice of forcing soldiers to engage into war crimes is common in Russia.

## 13. THE LEGALITY OF UKRAINIAN REVENGE KILLINGS

In several cases, Ukrainian forces were accused of carrying out revenge killings against certain targets. Of particular note was the assassination of the commander of the submarine *Krasnodar*, which was identified as launching missile attacks against targets in Ukraine. Cpt 2<sup>nd</sup> rank *Vladislav Rzhitsky* was shot while jogging in his civilian attire. There is, however, no specific rule of either conventional or customary international law which would prohibit killing enemy soldiers while they are not on duty (and not wearing uniform); general limitation on the killing of enemy combatants applies only once they are rendered *hors de combat*, through capture, surrender, or incapacitating injury – none of which was the case.

Soldiers need to no longer desire to participate in hostilities to be considered to be *hors de combat*; a temporary pause, such as in case of a leave, is not enough.

Therefore, the act itself was not in opposition to either convention or customary law. Even if declared to be illegal, such actions could be justified under the doctrine of reprisals.

#### 14. ACTIONS CARRIED OUT AGAINST OWN SOLDIERS

Compared to other recent conflicts, a new element which garnered considerable attention involved reprisals carried out by certain Russian units against their own soldiers – such as executions of returned POWs by Wagner mercenaries (Faulconbridge 2023) or often claimed usage of barrier troops against retreating forces (example: Gozzi 2023). Such situations as treatment by a side of their own troops are, however, outside of the scope of conventional or customary international humanitarian law and involve country obligation towards its own population under relevant Human Rights regimes.

A separate issue is the problem of POWs exchange if they are known to be under threat of receiving capital punishment from their military organisation. The 3<sup>rd</sup> Geneva Convention does not prohibit such exchanges and does not regulate situations of returning POWs to their country of origin, even if they face sanctions, including execution, for their conduct. No prohibition is imposed on a state not to return or exchange such prisoners, both in conventional and in customary international law.<sup>18</sup>

#### 15. CONCLUSIONS

It is clear that humanitarian law violations in the ground war in the Russian-Ukrainian conflict are systematic and widespread. It appears that from the onset, the Russian forces carried out actions that amounted to serious violations of humanitarian law and, in general, ignored its requirements, both as to measures used and actions taken – at times to the point where actions taken by Russia were likely contrary to military objectives.

The static nature of the conflict over the last year was a limiting factor as far as possible violations associated with ground operations were involved, in a similar manner to the Western Front of World War I.

At this stage of the conflict, an overall summary of humanitarian right violations is not possible – data collected by various observers likely illustrates

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<sup>18</sup> Such action could be however seen as a violation of a nations obligations under the European convention on the protection of human rights and fundamental freedoms – Right to Life as far as extradition to country where a person could receive death penalty is contrary to such obligation – see for example *Soering v. the United Kingdom* 7 July 1989 (article 3). No case law of interpretation however exists concerning obligations of a state towards Prisoners of War in this regard.

only a fraction of the total picture. A detailed investigation by independent authorities will take many years and will be possible after access to more data and documentation is obtained. Similarly, assigning the responsibility – including command responsibility – for specific crimes requires detailed knowledge of the mutual responsibilities and powers of command staff.

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